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IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

APR 6 1989

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

JOHNNIE LEE JONES, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )

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CASE NO. \_\_\_\_\_  
 (DCA Case No. 87-2427 &  
 88-2449)

PETITIONER'S BRIEF ON JURISDICTION

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V. DUGGER (AND OTHER DECISIONS)

AND

THE DISTRICT COURT CITED AS CONTROLLING AUTHOR-  
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STATEMENT OF THE CASE AND FACTS

In 1985 Jones was sentenced to 50 years imprisonment for third degree murder, grand theft and leaving the scene of an accident. This sentence constituted a departure from the guidelines sentence based upon the habitual offender statute. The District Court, Fourth District, reversed petitioner's sentence pursuant to Whitehead v. State, 498 So.2d 868 (Fla. 1986). Jones v. State, 502 So.2d 1375,1378 (Fla. 4th DCA 1987) (Jones I),

On resentencing the trial court stated new reasons for departure and again imposed an upward departure from the sentencing guidelines recommended range. This second departure sentence **was** reversed pursuant to Snull v. Dugger, 515 So.2d 748 (Fla. 1987), with specific directions to resentence Jones within the guidelines recommended range of three to seven years. Jones v. State 526 So.2d 176 (E'la. 4th DCA 1988) (Jones 11).

The third sentence of appellant resulted in a third upward departure sentence of 50 years which was affirmed by the Fourth District Court of Appeal in a decision of March 29, 1989, on which discretionary review is now sought in this Court, Jones v. State, \_\_\_\_\_ F.L.W. \_\_\_\_\_ (Fla. 4th DCA March 29, 1989). (Appendix 1-3) (Jones 111). This third departure was allowed because, the Fourth District reasoned, the initial sentence in 1985 was not intended by the trial judge nor considered by the parties as a departure sentence at the time it was imposed. The District Court held that in these circumstances the trial court must be given an opportunity to depart after a remand for resentencing,

SUMMARY OF ARGUMENT

The decision in petitioner's case allowing the trial court a second opportunity to impose a departure sentence after the first basis for departure, the habitual offender status, was invalidated under an appellate reversal pursuant to Whitehead v. State, directly and expressly conflicts with Shull v. Dugger and other decisions of this Honorable Court as well **as** expressly and directly conflicting with decisions of other district courts of appeal on the same question of law.

Another basis for this Court's jurisdiction exists. The district court cited as controlling authority a case which is pending discretionary review in this Court, Roberts v. State. Citation to controlling authority which is pending review here also confers jurisdiction on this Court **to** review the decision in petitioner's case.

ARGUMENT

THE COURT HAS JURISDICTION TO REVIEW THE  
DECISION IN PETITIONER'S CASE FOR TWO REASONS:  
IT DIRECTLY AND EXPRESSLY CONFLICTS WITH SHULL  
V. DUGGER (AND OTHER DECISIONS)

AND

THE DISTRICT COURT CITED AS CONTROLLING AUTHOR-  
ITY A DECISION THAT IS NOW PENDING REVIEW IN  
THIS COURT.

The decision of the Fourth District Court of Appeal in Petitioner's case expressly and directly conflicts with the decisions of this Court in Shull v. Dugger, 515 So.2d 748 (Fla. 1987), Brumbley v. State, 520 So.2d 275 (Fla. 1988) and Morganti v. State, 524 So.2d 641 (Fla. 1988), as well as lesser district court decisions, all of which hold a trial court may not enunciate new reasons justifying a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

The reason appellant was not sentenced within the guidelines recommended range in 1985 is because the trial court sentenced him instead as a habitual offender. This is the exact language used by the District Court to reverse Jones' original departure sentence as a habitual offender pursuant to Whitehead v. State:

With regard to sentencing, the trial court found that appellant was a habitual offender and deviated from the guidelines on this basis. The supreme court has since determined that a finding that the defendant is a habitual offender is not a permissible basis for departing from the sentencing guidelines. Whitehead v. State, 498 So.2d 863 (Fla. 1986).

Jones v. State, 502 So.2d 1375,1378 (Fla. 4th DCA 1987) (Jones I).

Petitioner Shull's sentencing proceedings contained identical circumstances; Mr. Shull was sentenced to ten years for grand theft. Although Mr. Shull's trial judge also did not give any written reasons for this departure, Shull v. State, 481 So.2d 1294 (Fla. 1st DCA 1986), the Court noted:

This sentence constituted a departure from the recommended guideline sentence based upon the habitual offender statute.

Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

Any rule of law which would allow a subsequent departure on resentencing of petitioner after a Whitehead reversal expressly and directly conflicts with Shull v. Dugger. Yet here the district court allows another departure sentence with new written reasons on resentencing because the trial court did not intend the original sentence to be a departure with reference to the guidelines. Jones' 1985 sentence was proper under the law in effect at the time of sentence but Whitehead v. State, was decided by the time of his direct appeal so Jones' initial departure sentence had to be reversed (Jones I). What the trial court intended or considered at the initial sentencing is immaterial under Shull v. Dugger. Shull v. Wuyger specifically prohibits imposition of another departure sentence after an appellate reversal of the reason for the first departure.

The district court's decision in petitioner's case attempts to avoid the impact of Shull v. Dugger for identical reasons rejected by this Court in Brumbley v. State and Morganti v. State. In both Brumbley and Morganti this Court held that even where the sole reason for departure had been held valid by

appellate courts at the time of sentencing if that reason was subsequently held invalid by the Supreme Court then the trial court could not on remand again depart from the guidelines, though the new reasons given existed at the time of the original sentence and are valid reasons for departure. That is precisely what happened here. At the time of appellant's initial sentence the trial court deviated from the guidelines on the basis that appellant was a habitual offender. This reason **for** departure was reversed on appeal, Jones I, as invalid under Whitehead v. State. Pursuant to Shull v. Dugger, Brumbley and Morganti, after the initial appellate reversal the trial court could not then enter new written reasons for departure even if they existed at the time of the initial sentencing.

In identical circumstances other district courts have held that on remand after reversal **of** a guideline departure for failure to provide a valid reason for departure, the trial court is prohibited from providing any new reason to exceed the original recommended sentence. Thus, the decision in petitioner's case likewise directly and expressly conflicts with the decision of the Third District in Harris v. State, 520 So.2d 688 (Fla. 36 DCA 1988). There the defendant's original sentence in excess of the guidelines for the sole reason that he was adjudicated a habitual offender was reversed pursuant to Whitehead, so the subsequent departure sentence could not stand because of the rule of law established in Shull v. Dugger. Likewise the instant decision expressly and directly conflicts with Dean v. State, 523 So.2d 165 (Fla. 1st DCA 1988), where the defendant's initial

habitual offender sentence was reversed because the trial court had failed to give written reasons for departure. Since the original departure sentence was based solely on the habitual offender statute, which was prohibited by Whitehead, the First District reversed the new habitual offender sentence with directions to resentence that defendant within the guidelines recommended range as required by Shull v. Dugger.

There is an additional basis for this Court's jurisdiction to review Jones III and that is that the decision in petitioner's case cited as controlling authority Roberts v. State, 534 So.2d 1225 (Fla. 1st DCA 1988), which decision is pending review in this Court under Case No. 73,439. This Court has jurisdiction to review a decision where the district court's decision expressly relies upon authority which is pending review in the Supreme Court of Florida. Jollie v. State, 405 So.2d 418 (Fla. 1981), State v. Brown, 475 So.2d 1 (Fla. 1985).

This Court should exercise its discretionary review jurisdiction because the saga of Johnnie Jones' journey between the Seventeenth Judicial Circuit and the Fourth District Court of Appeal is one of the absurd results envisioned and condemned by this Court in Shull. These numerous resentencings and attempts to impose a valid departure sentence on petitioner are expressly contrary to the rule of law established in Shull v. Dugger. Shull, 515 So.2d at 756.